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No. 95-227  
(Consolidated with No. 95-124)

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1995

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ALLIANCE FOR COMMUNITY MEDIA,  
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,  
AND PEOPLE FOR THE AMERICAN WAY, *et al.*,  
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA, *et al.*,  
*Respondents.*

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**On Writ of Certiorari  
to the United States Court of Appeals  
for the District of Columbia Circuit**

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**BRIEF FOR PETITIONERS  
ALLIANCE FOR COMMUNITY MEDIA,  
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,  
AND PEOPLE FOR THE AMERICAN WAY**

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I. MICHAEL GREENBERGER  
*Counsel of Record*  
SHEA & GARDNER  
1800 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 828-2000

[Names Of Additional Counsel Appear On Inside Front Cover]

December 28, 1995

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71/PA

JAMES N. HORWOOD  
SPIEGEL & MCDIARMID  
1350 New York Ave., N.W.  
Washington, D.C. 20005  
(202) 879-4002

*Counsel for Petitioners Alliance  
for Community Media and  
Alliance for Communications  
Democracy*

ANDREW JAY SCHWARTZMAN  
GIGI SOHN  
MEDIA ACCESS PROJECT  
2000 M Street, N.W.  
Washington, D.C. 20036  
(202) 232-4300

ELLIOT MINCBERG  
LAWRENCE OTTINGER  
PEOPLE FOR THE AMERICAN  
WAY  
2000 M Street, N.W.  
Washington, D.C. 20036  
(202) 467-4999

*Counsel for Petitioner People For  
the American Way*

THOMAS J. MIKULA  
MARK S. RAFFMAN  
MICHAEL K. ISENMAN  
DAVID B. GOODHAND  
SHEA & GARDNER  
1800 Massachusetts Ave., N.W.  
Washington, D.C. 20036  
(202) 828-2000

*Counsel for Petitioners  
Alliance for Community Media,  
Alliance for Communications  
Democracy, and People For  
the American Way*





## QUESTIONS PRESENTED

1. Whether a congressionally-enacted law can evade scrutiny under the First Amendment for asserted lack of state action when that law — Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 — on its face disadvantages certain constitutionally-protected speech on cable access channels based solely on the speech's content.

2. Whether Section 10 implicates state action and therefore invokes First Amendment scrutiny because (a) the statute and its implementing regulations preempt state and local law and cable franchise agreements; (b) the government has significantly encouraged censorship of indecent programming; and (c) public access channels — which Section 10 regulates — have been dedicated by local authorities for the public to use for expressive discourse and are therefore a public forum.

3. Whether Section 10, a law that on its face disfavors certain speech based solely on that speech's content, violates the First Amendment because it (a) fails to use the least restrictive means to further a compelling state interest; (b) imposes content-based restrictions solely upon those who speak via cable access channels; (c) is unconstitutionally vague; and (d) imposes prior restraints without proper judicial safeguards.

## LIST OF PARTIES

The judgment under review was rendered in a proceeding in which four petitions for review of orders of the Federal Communication Commission ("FCC") were consolidated: D.C. Cir. Nos. 93-1169, 93-1171, 93-1270, and 93-1276.

Petitioners Alliance for Community Media, Alliance for Communications Democracy, and People For the American Way were each petitioners in D.C. Cir. Nos. 93-1169 and 93-1270. None of these petitioners has parent companies or subsidiaries.

Respondents the FCC and the United States of America were both respondents in all four actions.

Petitioners New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group, and David Channon, and respondent National Cable Television Association, Inc., were each intervenors in all four actions.

Respondent Denver Area Educational Telecommunications Consortium, Inc. ("DAETCI") was a petitioner in D.C. Cir. Nos. 93-1171, and respondent American Civil Liberties Union ("ACLU") was a petitioner in D.C. Cir. Nos. 93-1171 and 93-1276. Both DAETCI and ACLU are petitioners in S. Ct. No. 95-124, which has been consolidated with this case.

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BRIEF FOR PETITIONERS  
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OPINIONS BELOW

The opinion of the Court of Appeals *in banc* ("the *in banc* court") is reported at 56 F.3d 105 (D.C. Cir. 1995), and is reprinted at App. 2a.<sup>1</sup> The panel opinion is reported at 10 F.3d 812 (D.C. Cir. 1993), and is reprinted at App. 90a. The

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<sup>1</sup>Citations to "App. \_\_a" refer to the appendix to the Petition for a Writ of Certiorari in No. 95-124.

First Report and Order ("First Order") and Second Report and Order ("Second Order") of the Federal Communications Commission ("FCC") are reported at 8 FCC Rcd 998 (1993) and 8 FCC Rcd 2638 (1993), and are reprinted at App. 128a and 178a, respectively.

### JURISDICTION

The *in banc* court issued its decision on June 6, 1995. Petitioners timely filed their petition for certiorari on August 9, 1995. This Court granted the petition on November 13, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) & 2350.

### CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act"), Pub. L. No. 102-385, 106 Stat. 1460, 1486 (1992), is reprinted at App. 126a. Subsections 10(a), (b), and (d) amended §§ 612 and 638 of the Communications Act of 1934 ("the 1934 Act"), 47 U.S.C. §§ 532 & 558 (1988 & Supp. V 1993), Stat. App. 2a-6a.<sup>2</sup> Subsection 10(c) appears in a note following 47 U.S.C. § 531, Stat. App. 2a.

The FCC promulgated regulations to implement Section 10 of the 1992 Act that are codified at 47 C.F.R. §§ 76.701 and 76.702 and that are reprinted at App. 170a and 197a, respectively.

### STATEMENT

**1. Introduction.** This case presents a First Amendment challenge to Congress's attempt to regulate the content of programs appearing on cable television public access and leased

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<sup>2</sup>Citations to "Stat. App. \_\_a" refer to the Statutory Appendix attached hereto.

access channels. The statutory scheme at issue here, Section 10 of the 1992 Act, regulates the programming carried on access channels by singling out a type of constitutionally protected speech that the government disfavors — "indecent speech" as Congress broadly defined it — and denying that speech the statutory right to be carried uncensored on access channels that all other constitutionally protected speech enjoys. The government and the *in banc* court both acknowledged that, if subjected to constitutional scrutiny, the core elements of Section 10 would be virtually indefensible under the First Amendment. See App. 11a, 104a n.9, 110a n.15, 111a n.16. Congress has attempted to dodge that result by creating a content-based scheme that enlists private parties — specifically, cable operators — to take the ultimate action to censor the disfavored speech. By contending that this mechanism does not involve "state action," the government seeks to insulate Section 10 from First Amendment review.

Petitioners cannot overemphasize that, despite Congress's rhetoric in enacting Section 10, this case is *not* about obscenity or pornography. Petitioners and their members include numerous nationwide and local organizations representing public access producers, programmers, editors, access center managers and staff members, and local government officials in hundreds of localities across the nation, as well as thousands of viewers of cable television.<sup>3</sup> Petitioners seek the right to transmit and receive constitutionally protected speech. They have no interest in transmitting obscenity or pornography and have no desire to see "how close to the line" they can come. Nor do petitioners contend that indecent material can under no circumstances be regulated. To the contrary, petitioners believe strongly in the importance of enabling parents to protect their children from material they deem inappropriate. Petitioners challenge the statute and regulations at issue *here*, however, as

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<sup>3</sup>Petitioners are three membership organizations: Alliance for Community Media, Alliance for Communications Democracy, and People For the American Way. For a description of each petitioner, see pages 19-20 of the Joint Appendix filed in Nos. 95-124 and 95-227 (consolidated).

an unconstitutional governmental regime that will result in the censorship of programming of substantial literary, artistic, scientific, and political merit that currently appears on access channels.

**2. Access and Its Origins.** For more than 25 years, access channels have been dedicated for the use of members of the public and other entities who otherwise would have no means to communicate via cable television, a medium that "stands at the center of an ongoing telecommunications revolution with still undefined potential to affect the way we communicate and develop our intellectual resources." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2451 (1994). Cable access channels, by definition, enable parties other than the cable operator to transmit programming over a cable system free from editorial control by the cable operator. See, e.g., George H. Shapiro, *Access*, in *Current Developments in CATV 1981* at 179 (1981) [hereinafter *Current Developments*]; Wally Mueller, *Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response*, 38 DePaul L. Rev. 1051, 1058 (1989) [hereinafter *Controversial Programming*]. Access channels thus serve as a conduit for "groups and individuals who generally have not had access to the electronic media . . . to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667.

Access channels fall into two categories: public, educational, and governmental ("PEG" or "public") access; and leased access. Members of the public may use public access channels without cost (or at nominal charge). Daniel L. Brenner, *et al.*, *Cable Television and Other Nonbroadcast Video* (1995) § 6.04[3][b] (1995) [hereinafter Brenner]. In contrast, the programmer must pay the cable operator a fee to use leased access. *Id.* § 6.05[2][c].

Local governmental authorities require cable operators, as a condition of franchising approval, to set aside public access channels for the free use of the general public on a first-come,

first-served, nondiscriminatory basis. See J.A. 58;<sup>4</sup> Brenner, *supra*, § 6.04[3][b]; *Manhattan Cable TV Community Programming Handbook*, reprinted in 3 Charles D. Ferris, et al., *Cable Television Law: A Video Communications Practice Guide* C-449, C-450 (1994) [hereinafter *Cable Television Law*]; *Controversial Programming*, *supra*, at 1060, 1100. Public access channels thus serve as a "site for communication among and between members of the public as the public, about issues of public importance." J.A. 57. In short, as Congress recognized in 1984, "[p]ublic access channels are often the video equivalent of the speaker's soap box," H.R. Rep. No. 934, *supra*, at 30, reprinted in 1984 U.S.C.C.A.N. at 4667, and thereby provide a public forum for the cable medium.

Public access had its origins in the 1960s, when a small number of cable systems began transmitting programming provided by local citizens. See generally Ralph Engelman, *The Origins of Public Access Cable Television 1966-1972* (1990); *Controversial Programming*, *supra*, at 1061. In order to provide the public with "a direct right of access to the video media," this phenomenon spread as local governments across the country conditioned franchise approval on cable operators' setting aside public access channels for the public's use. Brenner, *supra*, § 6.04[1] at 6-31. Local governments, in turn, provided the cable operator with "use of public rights-of-way and easements" essential to the cable system's "physical infrastructure." *Turner*, 114 S. Ct. at 2452.

From the start, freedom from editorial interference by the cable operator was a fundamental feature of public access channels. Local governments typically incorporated into the franchise agreement provisions prohibiting cable operators from interfering with programming on access channels.<sup>5</sup> The result

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<sup>4</sup>Citations to "J.A. \_\_\_" refer to the Joint Appendix filed in Nos. 95-124 & 95-227 (consolidated).

<sup>5</sup>See J.A. 186 & n.7 ("Many existing franchise agreements . . . prohibit cable companies from exercising editorial control over the content of programming on [access] channels."); 3 *Cable Television Law*, *supra*, at C-456 (Manhattan

was free expression. As the executive director of one public access channel summed up in 1972: "We're not here to editorialize or make decisions about what people can say over the air. If the Nazi Party walked in, I'd have to give them time. I wouldn't like it, but that's what public access is all about." Clem Morgello, *Do-It-Yourself TV*, *Newsweek*, Jan. 3, 1972, at 49, 50.

3. **Access and the 1984 Cable Act.** To assure that cable provided "the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521(4), Congress enacted the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (1984) ("the 1984 Act"), and included provisions relating to access channels in support of that goal.<sup>6</sup> Congress concluded that "[a] requirement of reasonable third-party access to cable systems will mean a wide diversity of information services for the public — the fundamental goal of the First Amendment — without the need to regulate the content of programming provided over cable." H.R. Rep. No. 934, *supra*, at 30, reprinted in 1984 U.S.C.C.A.N. at 4667.

Congress expressly recognized that by the time of the 1984 Act, public access channels were already required by "[a]lmost all recent franchise agreements." *Id.* The 1984 Act therefore ratified this preexisting authority of local governments to require public access channels as a condition of cable franchise approval, but did not independently require cable operators to provide such channels. See 47 U.S.C. §§ 531(a), 531(b), Stat. App. 1a. Congress sought merely to "continue[ ] the policy of

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Cable's 1976 rules denying cable operator control of "programming on public [access] channels"; *Current Developments*, *supra*, at 193 (generic operating rules agreement from 1981, providing that "[t]he cable company shall have no control over the content of public access programs").

<sup>6</sup>Prior to the 1984 Act, the FCC had sought to supplant locally created public access with a national rule requiring all cable systems to provide access channels. See Cable Television Report and Order, 36 F.C.C.2d 143, 189-92 (1972). These rules never went into effect, however, and in 1979 this Court ruled that the FCC lacked the statutory power to impose such rules. See *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

allowing cities to specify in cable franchises that channel capacity . . . be devoted to such use." H.R. Rep. No. 934, *supra*, at 30, *reprinted in* 1984 U.S.C.C.A.N. at 4667. In addition, the 1984 Act expressly required that cable operators provide leased access channels for commercial use by entities unaffiliated with the cable operator. 47 U.S.C. § 532(b)(1), Stat. App. 2a-3a.

In the 1984 Act, Congress recognized cable operators' hostility toward access programming. Congress understood that access channels may "represent[] a social or political viewpoint that a cable operator does not wish to disseminate," H.R. Rep. No. 934, *supra*, at 48, *reprinted in* 1984 U.S.C.C.A.N. at 4685. Congress also observed that access channels may "compete[] with a program service already being provided by that cable system," *id.*, and may use up channel capacity the operator could otherwise use for its own programming.<sup>7</sup> Thus, to ensure that access channels would remain available for use by the public, the 1984 Act reaffirmed the long-standing policy at the local level that prohibited cable operators from "exercis[ing] any editorial control over any" constitutionally protected expression appearing on access channels. 47 U.S.C. §§ 531(e), 532(c)(2), Stat. App. 1a, 4a. (emphasis added). Concomitantly, cable operators were granted a statutory immunity from *all* criminal and civil liability arising from the content of access programming, leaving liability with the member of the public or other entity that actually provided the programming. See 98 Stat. 2801 (1984) (prior version of 47 U.S.C. § 558).

**4. Public Access Today.** Public access channels have fulfilled the hope that they would become a robust "electronic marketplace of ideas." H.R. Rep. No. 934, *supra*, at 30, *reprinted in*

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<sup>7</sup>As this Court recently recognized, structural factors "give[] the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home," and therefore a cable operator, unlike speakers in other media, "can . . . silence the voice of competing speakers with a mere flick of the switch," creating "[t]he potential for abuse of this private power over a central avenue of communication." *Turner*, 114 S. Ct. at 2466.

1984 U.S.C.C.A.N. at 4667. Public access programming presents a widely diverse mix of topics from a variety of different sources.<sup>8</sup> Across the country, public access channels have "been used to promote nonprofit community organizations, involve senior citizens, present political issues, teach the mentally retarded to communicate, discuss current events, and present artists and entertainers." *Controversial Programming*, *supra*, at 1064-65. Public access speakers thus come from all walks of life. In Milwaukee, Wisconsin, for example, "the types of groups who have used public access include social service (28%), community (25%), education (12%), cultural (8%), religious (8%), arts (8%), health (7%), and government (3%)." *Id.* at 1064. Further, public access channels are often the forum for core political debate among a wide range of viewpoints. J.A. 10, 59.<sup>9</sup>

Moreover, access channels are widely viewed in those communities where they are available. Approximately 30 million homes or 70 million people are provided with an access channel on their cable system. J.A. 8-9. According to one multisite study in the rulemaking record, "47% of [cable] viewers watch community [access] channels, a quarter of them at least three times in two weeks; 46% say it was 'somewhat' to 'very' important in deciding to subscribe to or remain with cable." J.A. 56.

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<sup>8</sup>Some 2,000 centers throughout the country produce about 10,000 hours of local programming a week. J.A. 8, 56; *Cable Television Regulation (Part 2)*, 1990: *Hearings on H.R. 4415 Before the U.S. House of Representatives Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990) (statement of Sharon B. Ingraham, the National Federation of Local Cable Programmers); see also J.A. 56 (annual video festival dedicated to showcasing local origination and PEG channel productions attracted 2,100 entries in 1990 from 360 cities in 41 states).

<sup>9</sup>For instance, public access has been host to viewpoints as diverse as those of leftist critics of the Gulf War (in Deep Dish TV's national series) and those of Rep. Newt Gingrich (R-Ga), who hosted half-hour shows produced by the Washington, D.C.-based American Citizens' Television (ACTV). J.A. 10, 59.

On occasion, members of the public produce public access programming on subjects such as health and sex education, arts censorship, and feminism that may involve sexually explicit materials. This programming includes, for example: a live call-in show produced by a University of Michigan professor intended to "provid[e] critical answers to questions of human sexuality"; "Beyond the Loss of the Breast," an award-winning documentary about breast cancer victims that was shown on Palo Alto's public access channel; Cambridge Community Television's cablecast of a program entitled "Truth or Consequences: A Guide to Safe Sex at MIT"; "Desperately Seeking Susan," a program in Olympia, Washington that is hosted by a therapist and includes frank discussion of sexual behavior and dysfunctions; "Health in America," a monthly Sacramento program that discusses alternative health-care options and has included images of women with mastectomies and damaged breast implants; and the "HealthVisions" series, produced by Good Samaritan Hospital and Medical Center of Portland, Oregon, which has included programs entitled "PMS: Breaking the Cycle" and "Understanding Impotence: A Common and Treatable Problem." J.A. 21-23, 64, 67, 155; 1995 *Hometown Award Winners*, *Community Media Rev.*, Vol. 18, No. 3, at 12 (1995). Such programming provides valuable information, but may at times be controversial or offensive to some viewers.<sup>10</sup>

**5. Lockboxes.** The 1984 Act evinced Congress's concern that children be protected from any cable programming that their parents found unsuitable, whatever the channel. Thus, the 1984 Act included a "lockbox" provision, which requires cable operators to make available to their subscribers an electronic

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<sup>10</sup>Leased access programming often involves issues similar to those on public access. For example, the 90's Channel, owned by DAETCI (a petitioner in No. 95-124), demonstrates the benefits that leased access can provide. It has carried documentaries and magazine programs on political, environmental, labor, and social topics, much of which was otherwise unavailable to viewers. J.A. 199. A small but important portion of the 90's Channel's programming has dealt with such topics as sex education and AIDS, gay rights, feminism, and arts censorship. J.A. 199-200.

device that "prohibit[s] viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. § 544(d)(2), Stat. App. 5a. A lockbox thus permits an adult subscriber to control what programming that subscriber's household may view.<sup>11</sup>

Congress, the FCC, the courts, and cable operators have all recognized that lockboxes are an effective way to protect children from material their parents deem inappropriate. In the legislative history of the 1984 Act, Congress recognized that the lockbox provision "provides one means to effectively restrict the availability of [unsuitable or unwanted] programming, particularly with respect to child viewers, without infringing the First Amendment rights of the cable operator, the cable programmer, or other cable viewers." H.R. Rep. No. 934, *supra*, at 70, reprinted in 1984 U.S.C.C.A.N. at 4707.

The FCC, too, has embraced lockboxes as an effective means to protect children from inappropriate programming. Soon after passage of the 1984 Act, the FCC concluded that "the provision for lockboxes largely disposes of issues involving the Commission's standard for indecency, and would also be a significant factor in cases related to obscenity and similar offensive programming." Implementation of the Provisions of the Cable Communications Policy Act of 1984, MM Dkt. No. 84-1296, 50 Fed. Reg. 18,637, 18,655 (1985). The FCC has also specifically found that lockboxes "can restrict access by children whether or not parents are physically present and actively supervise." Enforcement of Prohibitions Against Broadcast Indecency, MM Dkt. No. 89-494, 5 FCC Rcd 5297, 5305 (1990).

Courts and cable operators have also noted the effectiveness of lockboxes. Indeed, the *in banc* court below, even while

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<sup>11</sup>Lockboxes vary in their level of sophistication depending upon the technology employed. See, e.g., J.A. 79-154 (instructions for various lockboxes). Many permit a parent to automatically lift the lock at a particular time, while others can only be unlocked manually. In either case, parents can lock out an access channel they do not wish the child to view and then unlock it when they want themselves or their children to view a specific program. J.A. 23.

rejecting lockboxes as an alternative to Section 10's approach, suggested that "lockboxes are effective means of restricting access to indecent programming." App. 38a n.22; see also *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) (noting "parental manageability of cable television" afforded by "lockbox" or "parental key.>"). Likewise, two of the largest cable operators in the country, a number of smaller cable operators, and a cable operator trade association all noted the utility of lockboxes in the rulemaking record below, J.A. 160, 178, 246-47, 256-57, and the record shows that Time Warner Cable regularly informs subscribers of the availability of lockboxes to block undesired programming. See J.A. 372.

**6. Section 10 of the 1992 Cable Act.** The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("the 1992 Act"), is a lengthy enactment that was designed, after months of debate, study, and drafting, to promote diversity of views and information available via the cable medium and to increase competition in the cable industry. See Section 2(b) of the 1992 Act. It accomplished these tasks primarily by reregulating cable service and implementing the "must-carry" rules that were at issue in *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994).

The provisions challenged here, however, were a legislative afterthought. Neither of the bills that originated the 1992 Act contained any provision resembling what is now Section 10, nor did any congressional hearing or report discuss the provision. Rather, on the last legislative day before the Senate approved the bill, three separate floor amendments were added that were collectively codified as Section 10.

Section 10's interdependent provisions amended the 1984 Act's content-neutral treatment of programming on access channels to create a new content-based censorship scheme. Under this scheme, which applies to access channels, but not to any other cable television channels, the government identifies a type of speech it disfavors and authorizes cable operators to ban that type — and only that type — of speech. Simultaneously, the scheme imposes criminal and civil liability upon the cable operator if it does not ban the speech and if

that speech — which is authored not by the cable operator but by the public or other entities unaffiliated with the cable operator — "includes obscene material."

Section 10(c), which applies to public access channels, requires the FCC to promulgate regulations authorizing a cable operator to prohibit programming containing "sexually explicit conduct" or "material soliciting or promoting unlawful conduct." See 47 U.S.C. § 531 note, Stat. App. 2a. Thus, under this provision, all constitutionally protected speech outside these categories *must* be carried by the cable operator, but operators are specifically authorized by Congress *not* to carry material falling within the disfavored categories.

Sections 10(a) and 10(b) provide two of the key components of the government's censorship scheme for leased access programming. Section 10(a) authorizes cable operators to prohibit leased access programming that the operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards" (i.e., "indecent programming"). See 47 U.S.C. § 532(h), Stat. App. 4a. If the cable operator does not ban such programming pursuant to Section 10(a), Section 10(b) requires the cable operator to place the disfavored programming on a separate, blocked channel which the subscriber can receive only by requesting access in writing. See 47 U.S.C. § 532(j), Stat. App. 4a-5a. Under these two subsections, therefore, "indecent" programming must be blocked or banned outright, while no other leased access programming may be censored by cable operators at all.

For both public access and leased access, Section 10(d) partially abrogates the statutory immunity from liability for the content of access programming that the 1984 Act provided cable operators, and thereby effectively compels cable operators to censor. This newly-imposed liability leaves the cable operator subject to civil and criminal liability for carrying access programming that "involves obscene material." See 47 U.S.C. § 558, Stat. App. 6a. Section 10(d) thus imposes liability on cable operators for speech they merely transmit as a conduit. Upon introducing this provision on the Senate floor, its sponsor

forthrightly declared that its purpose was to "put an end to the kind of things going on" on access channels. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (statement of Senator Helms).

Despite its dramatic departure from the 1984 Act's method of protecting children from inappropriate cable programming, Section 10 was not addressed at any legislative hearing and received only abbreviated discussion on the Senate floor. The impetus for this legislation was essentially a few anecdotes based on constituents' letters complaining about programs on access channels.<sup>12</sup> The brief remarks made on the Senate floor focused on two themes: first, that Congress disliked a certain type of programming — so-called "indecent" programming — and second, that Congress's efforts to disadvantage this type of programming should evade constitutional review.<sup>13</sup> The legislative record contains no findings to support a conclusion that lockboxes have somehow become ineffective to protect minors from indecent programming — indeed, neither lockboxes nor any other less restrictive means were ever even mentioned. Nor was there any showing that access programming presents unique problems compared to other programming.

**7. The FCC's Rulemaking and Implementing Regulations.** The FCC commenced an informal rulemaking to implement Section 10. Petitioners participated in that rulemaking and filed extensive comments detailing Section 10's constitutional

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<sup>12</sup>The administrative record below indicates that Congress's concern about highly objectionable programming appearing on public access channels was in fact misplaced. The anecdotes related on the Senate floor of objectionable programming that supposedly appeared on *public* access, see 138 Cong. Rec. S649-50 (daily ed. Jan. 30, 1992) (statements of Senators Fowler and Wirth), actually appeared on *leased* access channels. See J.A. 238.

<sup>13</sup>See, e.g., 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (Senator Helms: "Under my amendment, cable operators have the right to reject such filthy programming."); *id.* (Senator Helms: "[T]here is no constitutional problem with this amendment because this is not governmental action. It is an action taken by a private party."); *id.* at S649 (Senator Fowler: "[Indecent and other undesired programming] should be stopped, must be stopped, and I think this amendment will empower the cable operators to stop it.").

infirmities. J.A. 4-154, 281-310.<sup>14</sup> Some forty other parties also participated in the rulemaking.

The extensive record developed in that proceeding revealed that cable operators intended to use their new censorship powers broadly. *E.g.* J.A. 1-2, 77-78, 175-76, 228-29. It further revealed that many cable operators agreed with petitioners that Section 10's censorship scheme posed serious constitutional problems. *E.g.*, J.A. 157, 159-60, 175, 197, 232-33, 244. Finally, the record was replete with examples of valuable programming of literary, artistic, scientific, and political merit that could be subject to censorship pursuant to Section 10. See J.A. 21-23, 64-68, 155, 164, 200, 224-25; see also App. 99a n.3 (FCC's broad definition of "indecent" could include "a truly scientific program . . . that discusses the prevention of life-threatening diseases through the use of condoms").

The FCC subsequently issued two Reports and Orders that promulgated regulations implementing Section 10. Consistent with Congress's command, these regulations authorize cable operators to ban indecent programming on leased and public access channels. 47 C.F.R. §§ 76.701(a), 76.702, App. 171a, 197a-98a. The regulations also require all access programmers to self-identify any "indecent" programming. 47 C.F.R. §§ 76.701(d), 76.701(e), 76.702, App. 171a-72a, 197a-98a. Unless the access programmer certifies that the programming is not indecent, the cable operator need not carry the programming in question. 47 C.F.R. §§ 76.701(f), 76.702, App. 172a, 197a-98a. The FCC justified these certification requirements "in view of the removal of cable operators' immunity" pursuant to Section 10(d). Second Order ¶ 25, App. 192a; First Order ¶ 50, App. 155a-56a. If a dispute arises between a leased access programmer and a cable operator over whether a particular program is "indecent," the FCC has agreed to resolve the dispute (although it will not do so for disputes involving public access programming). See First Order ¶ 75,

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<sup>14</sup>Also joining petitioners' comments was the American Civil Liberties Union, a petitioner in No. 95-124, which the Court has consolidated with this case.

App. 167a-68a; Second Order ¶ 30, App. 194a. Finally, if a cable subscriber submits a written request to receive leased access programming that a cable operator has blocked under Section 10(b) (rather than banning it outright under Section 10(a)), the cable operator may take up to a month to comply with the request. 47 C.F.R. § 76.701(c), App. 171a.

The FCC also concluded that "state laws regarding indecency . . . *are preempted* by the Cable Act's explicit provisions governing indecent programming." First Order ¶ 51 n.44, App. 157a (emphasis added), and that "Congress intended the new rights accorded by section 10(c) to *supersede prior agreements*" regarding public access. Second Order ¶ 10 n.7, App. 184a (emphasis added). Thus, notwithstanding that many local governments bargained for access channels to be free from the cable operator's editorial interference as a condition of franchise approval, or that some state laws prohibit censorship of access programming, Section 10 overrides such franchise agreements and state laws, giving cable operators a power to exercise editorial discretion over indecent speech that they ~~never~~ previously had, while leaving intact the ban on censorship of all other speech.

Recognizing some of the constitutional problems raised by Section 10, the FCC narrowed several of the statutory terms. For example, the FCC interpreted the overbroad phrase "sexually explicit conduct" in Section 10(c) to mean "indecent" as defined in 10(a). Second Order ¶ 15, App. 187a. Similarly, the agency recognized that not all "material soliciting or promoting unlawful conduct" could be constitutionally prohibited, and therefore construed that term in Section 10(c) to mean "material that is otherwise proscribed by law," regardless of whether it involves solicitation or promotion of unlawful conduct. See Second Order ¶¶ 16-17, App. 187a-88a. These interpretations were codified into the final rule. See 47 C.F.R. § 76.702, App. 197a-98a.

The FCC also acknowledged that Section 10(d)'s abrogation of the cable operator's immunity for access programming that "*involves obscene material*" was far too vague and overbroad to withstand constitutional scrutiny. Yet, though the FCC said it

would interpret the subsection "to remove immunity only for provision of programming that is unprotected by the [F]irst [A]mendment," First Order ¶ 44 n.40, App. 152a, it failed to codify this narrowing construction in the final rule.

**8. The Panel Decision Below.** Petitioners sought review of the FCC orders in the Court of Appeals and argued that Section 10 and the regulations promulgated thereunder violated the First Amendment. Counsel for the government conceded at oral argument before a panel of the Court of Appeals that Sections 10(a) and 10(c) were unconstitutional if state action was present. See App. 104a n.9, 110a n.15, 111a n.16.

The panel found state action present and accordingly invalidated the statute. First, invoking the "significant encouragement" test of *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), the panel found that Sections 10(a) and 10(c) and their implementing regulations involved state action because they "evince[] an effort on the part of the government to enlist the cable operator in the suppression of indecent material" in that they "focus[] the cable operator's attention on the only material the government seeks to suppress, and then permit[] the cable operator expressly to suppress that — and no other — material." App. 104a-05a. Then, consistent with the government's concession, the panel found that Sections 10(a) and 10(c) could not survive constitutional scrutiny under the "least restrictive means" test applicable to any content-based regulation of speech. App. 109a, 111a. Finally, the panel held that the block-and-segregate provisions of Section 10(b) singled out leased access channels for content-based regulation while leaving other channels (e.g., a cable operator's own channels) unregulated, and remanded this issue to the FCC "to justify or to cure" this potential constitutional infirmity. App. 121a.

**9. The *In Banc* Decision Below.** On rehearing, the *in banc* court acknowledged that if decisions not to carry indecent programs on access channels "were treated as decisions of the government, the . . . United States would be hard put to defend the constitutionality of" Section 10. App. 11a. Nonetheless, the *in banc* court held that because the censorship contemplated by Congress was "permissive" — that is, cable operators are

authorized, but ostensibly not required, to censor "indecent" programming on access channels — no state action was involved in the scheme. In so holding, the *in banc* court was unpersuaded that state action was present, despite the fact that "Congress enacted section 10(a) and section 10(c)," which on their face single out particular speech for unfavorable treatment based on its content, and "a federal agency issued regulations putting the provisions into effect." App. 12a. Rather, the *in banc* court mistakenly assumed that Congress had merely "restore[d]" editorial discretion to cable operators, App. 15a, even though local franchising agreements, as well as some state laws, had precluded such editorial discretion since long before the 1984 Act. The *in banc* court also considered and rejected the argument that access channels constitute a public forum, notwithstanding contrary expressions by Congress, commentators, and the FCC. App. 29a.

The *in banc* court did pass on the constitutionality of Section 10(b)'s mandatory blocking of "indecent programming" on leased access, but found that this measure was the least restrictive means of furthering the state's interest in shielding children from indecent material. The *in banc* court acknowledged that existing law already mandates that cable operators make lockboxes available to subscribers, that lockboxes enable parents "to block indecent programming they do not want their children to see," and that lockboxes "are effective means of restricting access to indecent programming." App. 38a n.22. Nonetheless, the *in banc* court upheld the constitutionality of Section 10(b) on the ground that lockboxes do not provide perfect protection against the possibility that children will view indecent material. App. 36a.

Four judges dissented from all or part of the majority opinion. In the principal dissenting opinion, Judge Wald observed that Section 10 creates "two fundamentally different statutorily-assigned schemes of substantive and procedural rights, duties, and burdens" depending on "whether the content of the programming meets the government's definition of 'indecent.'" App. 71a-72a. Citing this Court's decision in *Turner*, Judge Wald concluded that Section 10 is "a

congressionally-enacted statute that both facially discriminates on the basis of the content of speech, and has a 'manifest purpose' to 'burden . . . speech of a particular content.'" App. 73a.

### SUMMARY OF ARGUMENT

Section 10 and its implementing regulations involve state action for three reasons, each of which is sufficient by itself to require First Amendment scrutiny. First, Congress's very enactment of Section 10, which on its face disadvantages certain disfavored speech based solely on the speech's content, is *action* by the *state* and therefore subject to review. Laws like Section 10 "that suppress, disadvantage, or impose differential burdens upon speech because of its content" are subject to the "the most exacting scrutiny" under the First Amendment. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994).

Second, Section 10's preemption of all contrary state laws and local franchising agreements constitutes state action. State action is present when a federal law authorizes private parties to act in contravention of state law or contractual obligations that would otherwise apply. *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956). Section 10 enables cable operators to censor indecent programming on access channels, notwithstanding state law and local franchising agreements prohibiting such censorship.

Third, state action is present because, through Section 10, Congress has significantly encouraged cable operators to prohibit the type of speech Congress disfavors. *Skinner v. RLEA*, 489 U.S. 602 (1989). Section 10 removes the legal impediment preventing cable operators from censoring indecent speech, while leaving that impediment intact for all other types of speech, and simultaneously makes the cable operator liable for any uncensored material that "involves obscene material." Section 10(d), App. 127a. Moreover, with respect to leased access, cable operators are required either to adopt an administratively burdensome system to block indecent speech under Section 10(b), or to avoid such burdens by banning the speech outright pursuant to Section 10(a). Finally, the FCC

participates in the censorship by resolving disputes between leased access programmers and cable operators.

Section 10 also faces First Amendment scrutiny because it imposes content-based distinctions on speech in public fora established by local governments. Because localities have dedicated public access channels for the public's expressive activity, those channels provide an electronic public forum for the cable medium. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985). Congress's attempt to modify the character of the public forum provided by public access triggers First Amendment review.

Section 10 cannot withstand First Amendment scrutiny. As a law that discriminates against certain constitutionally protected speech on the basis of the speech's content, Section 10 can pass constitutional muster only if it constitutes the least restrictive means to further a compelling government interest. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989). Section 10 impedes both programmers' ability to speak, and viewers' crucial right to receive speech, via access channels. Congress never considered, however, any less restrictive means of protecting children from indecency, such as the "safe harbors" used in broadcasting, or cable "lockboxes," which cable operators are already required under existing law to make available to subscribers. In fact, Congress's failure to investigate whether the existing lockbox requirement already advances the articulated interest before enacting a more restrictive scheme alone renders Section 10 unconstitutional.

Section 10's imposition of content-based restrictions only upon those who speak via access channels also violates the First Amendment. Only access programmers face content-based burdens imposed by Section 10; programmers of other channels do not. Congress may not distinguish among speakers in this manner. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

Section 10 is unconstitutionally vague because the definition of "indecent" speech, which includes material that cable operators "reasonably believe[]" to be "patently offensive,"

Section 10(a)(2), App. 126a, essentially boils down to a subjective determination of good taste. Arbitrary application by cable operators and self-censorship by access programmers is sure to result, contrary to the First Amendment. *NAACP v. Button*, 371 U.S. 415 (1963).

Finally, Section 10 imposes a system of content-based prior restraints upon access programming by delegating censorship power to cable operators, who then act as involuntary government surrogates. Given the absence of required judicial safeguards, this system of prior restraints violates the First Amendment. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975).

## ARGUMENT

### I.

#### SECTION 10 OF THE 1992 CABLE ACT AND THE REGULATIONS PROMULGATED THEREUNDER REQUIRE CONSTITUTIONAL SCRUTINY.

##### A. State Action Is Inherent in the Enactment of Section 10 Because It Favors Some Speech But Disfavors Other Speech Based Solely on the Speech's Content.

##### 1. *The Constitutionality of Section 10 Must be Evaluated Based on the Nature of Petitioners' Constitutional Challenge.*

The first five words of the First Amendment make the state action picture in this case clear: "*Congress shall make no law . . . abridging the freedom of speech.*" (Emphasis added.) In this case, the "law" that "abridg[es] the freedom of speech" is a Congressional enactment — Section 10 of the 1992 Act. It is beyond dispute that this law, as well as its implementing regulations, are the products of state action.

Further, this law is precisely the sort of enactment that this Court has said must be subjected to First Amendment scrutiny. Just last year, this Court reaffirmed that the First Amendment requires "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because

of its content." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2458-59 (1994) (emphasis added). The provisions of Section 10 plainly "disadvantage" and "impose differential burdens" on certain speech — "indecent" programming on cable access channels — based on its content. As a result of the 1992 Act's amendment of the 1984 Act, all speech that members of the public wish to communicate over all access channels is free from censorship, *except* for speech that is "indecent," which is subject to censorship by the cable operator. Thus "indecent" speech is, by law, worse off than all other speech insofar as access to cable television is concerned. All other speech has an automatic right to appear on access channels; "indecent" speech may appear only at the sufferance of the cable operator. The mere fact of being subject to censorship, while all other speech is not, is a disadvantage and a differential burden that Congress has visited upon "indecent" speech based solely on its content.<sup>15</sup>

It is the very creation of this content-based law by Congress — the ultimate state actor — that petitioners contend is unconstitutional on its face. It is the *government*, through Section 10, that specifies what speech may be censored and what speech may not be censored. Accordingly, the state action here is as plain as it is in any case in which a party challenges a law that disadvantages speech based on its content. See Laurence H. Tribe, *American Constitutional Law* § 18-1, at 1688 (2d ed. 1988) ("If litigants challenge a federal or state *statute* . . . in a case where the validity of the statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed."); Cass R. Sunstein, *The Partial Constitution* 204 (1993) ("[T]o find a constitutional violation, one needs to show that

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<sup>15</sup>Even respondent National Cable Television Association ("NCTA") — the principal trade association of the cable television industry — recognizes Section 10 as a content-based regulation of speech. The NCTA described Section 10 as follows in the record below: "[The Act] allows operators to deny access to *some* speech — but only to speech that the *government* defines as objectionable . . . . This direct regulation of content is on very shaky constitutional grounds." Comments of NCTA at 4; see J.A. 244.

governmental action has abridged the freedom of speech. That action must usually take the form of a law or regulation.").

The present case therefore is not like those in which the actions of a *private* party defendant were alleged to have violated the constitution. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); cf. 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 16.1, at 524 (2d ed. 1992) ("The so called 'state action' issue arises only when the person or entity alleged to have violated the Constitution is not acting on behalf of the government."). To be sure, Section 10 envisions that private cable operators will play a role in the censorship of indecent speech. But whether private cable operators are state actors when they censor indecent speech need not be decided here. This suit is directed against state actors — the United States and the FCC — and challenges on its face a content-based law put in place by those actors. See *Blum*, 457 U.S. at 1003 ("Faithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint."). Regardless of who is doing the actual censoring, and whether the act of censorship is compelled, encouraged, or merely authorized, the government's decision to enact a law that disadvantages certain speech based on its content is all that is needed to invoke First Amendment scrutiny. Otherwise, "the government [would] evade constitutional responsibility for its own conduct, simply because it has set up a private party as the triggerman in its carefully crafted scheme." App. 74a (Wald, J., dissenting).

In short, when Congress makes a law that on its face disadvantages protected speech based on its content, that law must receive First Amendment scrutiny. The only state action necessary to invoke this scrutiny when parties present a facial challenge to the law should be the creation of the content-based law itself. Accordingly, Section 10's constitutionality must be evaluated in this case.

2. ***The In Banc Court's Focus on the Restoration of Editorial Discretion to Cable Operators Is Both Factually Inaccurate and Irrelevant to the State Action Inquiry.***

The *in banc* court rested its refusal to reach the constitutionality of Sections 10(a) and 10(c) in large part on its mistaken view that Section 10 merely "restored" to cable operators the editorial discretion to ban indecent programming that Congress took away under the 1984 Act. App. 13a-14a. That conclusion, however, is both factually erroneous and legally irrelevant.

First the facts: It is undisputed that long before the 1984 Act, many local cable franchising agreements precluded cable operators from exercising editorial discretion over the content of programming on access channels. Indeed, local governments established public access channels so that members of the public could communicate via the cable medium free from the editorial interference of the cable operator. See *supra* pp. 4-6. Thus, Section 10 did *not* restore discretion taken away by the 1984 Act; by virtue of local franchise agreements, cable operators typically never had that discretion in the first place.

Second, the law: Even if Section 10 had restored editorial discretion previously withdrawn by Congress, the *discriminatory* restoration of pre-existing discretion is subject to constitutional scrutiny. For example, if Congress were to carve out a narrow exception to a broad-based anti-discrimination law, such as Title VII's ban on employment discrimination, by amending the statute to allow private employers to discriminate against persons of a particular race, the government surely could not evade scrutiny of such a statute on state action grounds. To the contrary, "if the purpose of repealing legislation is to disadvantage a racial minority, *the repeal is unconstitutional.*" *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 539 n.21 (1982) (emphasis added). Even though the statute would arguably "restore" to employers the pre-existing right to base employment decisions on discriminatory grounds, the end result would be a statute that outlawed discrimination against members of all races but one, and that would surely constitute

the creation, by a government actor, of an unconstitutional scheme.

Here, Congress's putative "restoration" of editorial discretion similarly demands constitutional scrutiny. Congress, by enactment of the 1992 Act, "restored" editorial discretion over a single category of speech based solely on its content, thereby leaving that speech at a disadvantage vis-a-vis all other speech. The end result is a law that disfavors speech based solely on its content, which must be subject to constitutional scrutiny.

**B. State Action Inheres in Congress's Passage of a Law That Preempts All Contrary State Laws and Supersedes All Conflicting Local Franchising Agreements.**

State action is present in Section 10 and its implementing regulations for the additional reason that Section 10 preempts all contrary state and local laws and cable franchise agreements that would otherwise forbid cable operators from exercising editorial discretion over indecent programming on access channels. This preemptive effect gives rise to state action even if the regulatory scheme simply authorizes, without compelling, censorship of indecent programming.

Under this Court's decision in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), it is settled that federal statutes that preempt contrary state and local laws give rise to state action, even when the federal statute allows, but does not command, a particular result. In *Hanson*, this Court assessed the constitutionality of the Railway Labor Act's ("RLA") union shop provision, which — like the statute and regulations at issue here — was "permissive" in the sense that "Congress ha[d] not compelled nor required carriers and employees to enter into union shop agreements." *Id.* at 231. In concluding that, despite its permissive nature, the provision implicated state action, this Court affirmed the reasoning of the Nebraska Supreme Court:

"The Supreme Court of Nebraska . . . took the view that justiciable questions under the First and Fifth Amendments were presented since Congress, by the union shop provision of the Railway Labor Act, sought to strike down

inconsistent laws in 17 States. The Supreme Court of Nebraska said 'Such action on the part of Congress is a necessary part of every union shop contract entered into on the railroads as far as these 17 States are concerned for without it such contracts could not be enforced therein.' We agree with that view." *Id.* at 231-32 (citations omitted).

Thus, the *Hanson* Court reasoned, "[i]f private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." *Id.* at 232. State action followed from the RLA's preemptive effect, because any privately negotiated union shop agreement carried "the imprimatur of the federal law upon it" since it "could not be made illegal nor vitiated by any provision of the laws of a State." *Id.*

*Hanson's* core principle — that state action follows from federal preemption — has been re-acknowledged by this Court on several occasions. See *Communications Workers of Am. v. Beck*, 487 U.S. 735, 761 (1988) ("[W]e ruled in [*Hanson*] that because the RLA preempts all state laws banning union-security agreements, the negotiation and enforcement of such provisions in railroad industry contracts involves 'governmental action.'"); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1977) (The RLA "preempts any attempt by a State to prohibit a union-shop agreement. Had it not been for that federal statute, the union-shop provision at issue in *Hanson* would have been invalidated under Nebraska law. The *Hanson* Court accordingly reasoned that government action was present. . . ."); see also *Skinner v. RLEA*, 489 U.S. 602, 615 (1989) (finding state action in regulations that provide for non-mandatory drug-testing by private employers, which, *inter alia*, "preempt state laws, rules or regulations covering the same subject matter and are intended to supersede 'any provision of a collective bargaining agreement'" (citations omitted); cf. *Reitman v. Mulkey*, 387 U.S.

369 (1967) (creation of impediment to enactment of law constitutes state action).<sup>16</sup>

As in *Hanson*, the regulatory scheme at issue here precludes contrary state law. In promulgating its regulations under Section 10, the FCC announced that "Congress, through enactment of Section 10, clearly intended that its legislative scheme would prevail over *any state or local laws that attempted to . . . regulate indecent programming*." First Order ¶ 50 n.42, App. 155a (emphasis added). Indeed, Section 10's regulatory scheme goes further than the law in *Hanson* because it also restricts the power of local governments to enforce franchising agreement provisions that forbid cable operators from exercising any editorial control over access programming. Thus, the FCC flatly declared that "Congress intended the new rights accorded by [S]ection 10(c) to supersede prior agreements" regarding public access. Second Order ¶ 10 n.7, App. 184a.<sup>17</sup>

Accordingly, the regulatory scheme does not simply tolerate a cable operator's decision to ban indecent programming from its access channels. It clears the way for cable operators to make these decisions by ousting any and all inconsistent state and local laws<sup>18</sup> and the "[m]any existing franchise agreements

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<sup>16</sup>Lower federal courts have similarly recognized that the finding of state action in *Hanson* "rests squarely on the fact that the RLA expressly preempts contrary state law." *Price v. International Union*, 927 F.2d 88, 92 (2d Cir. 1991); *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410 (10th Cir. 1971).

<sup>17</sup>In addition, pursuant to 47 U.S.C. § 556(c), "any provision of law of any State, Political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded."

<sup>18</sup>For example, a New York law prohibiting any cable operator from exercising any censorship over a leased or public access channel is now preempted by Sections 10(a) and 10(c). See N.Y. Exec. Law § 829(3) (McKinney 1982); see also V.I. Code Ann. tit. 30, § 319(c) (1984) (similar prohibition in Virgin Islands). Similarly, both New York and New Jersey have laws insulating cable operators from liability for what appears on public access channels. N.Y. Exec. Law § 830 (McKinney 1982); N.J. Stat. Ann. § 48:5A-50 (West 1995). These laws are superseded by Section 10(d).

[that] prohibit cable companies from exercising editorial control over the content of programming" on leased and public access channels. J.A. 186. This, as *Hanson* holds, and as petitioners pointed out to the *in banc* court, constitutes state action that requires constitutional scrutiny. The *in banc* court never addressed this argument, however.

**C. State Action Is Present in the Section 10 Scheme Because It Reflects the Government's Strong Preference for and Thus Significantly Encourages the Underlying Private Conduct.**

Although petitioners brought this case against the government and not against any cable operator, the *in banc* court focused on an issue not raised by petitioners and unnecessary to the resolution of this case: whether private cable operators would be state actors when they censored a program under the authority granted by Section 10 and the FCC's regulations. Even if the *in banc* court were correct to assume that Section 10's role for private cable operators is a critical part of the threshold analysis of this case, the purpose, structure, and effect of Section 10, considered in light of this Court's precedents, permit only one conclusion: Congress has significantly encouraged private cable operators to ban indecent speech from access channels. Such "significant encouragement," this Court has held, constitutes state action.

"It is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973). The government must therefore be held accountable for actions taken by private parties where it "has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982). Thus, while this Court has rejected state action arguments where the State merely "acquiesce[d] in" the challenged conduct, *Blum*, 457 U.S. at 1004-05, it has found sufficient encouragement where the State adopted more than just a "passive position" toward the

challenged conduct. See, e.g., *Skinner v. RLEA*, 489 U.S. 602, 615 (1989).

In *Skinner*, this Court assessed the constitutionality of federal regulations allowing railroads to conduct drug and alcohol tests on their employees, which the government deemed necessary to curb alcohol and drug abuse. *Id.* at 606. Although the regulations were framed in permissive terms — they "authorize[d]" railroads to require tests, but did not compel such tests, *id.* at 611 — they nonetheless simultaneously "preempt[ed]" state laws, rules, or regulations covering the same subject matter," and "supersede[d]" any conflicting provision of a collective bargaining agreement between railroads and unions. *Id.* at 615. Further, they allowed the government to participate in the scheme by requesting drug test results. In rejecting the petitioners' contention that, under these circumstances, any drug testing would be "primarily the result of private initiative," this Court emphasized that "[t]he Government has removed all legal barriers to the testing authorized by [the regulations], and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusion." *Id.* "These are clear indices," this Court held, "of the Government's encouragement, endorsement, and participation" in the ostensibly "permissive" drug-testing scheme. *Id.* at 615-16.

As we now show, examination of the present facts through the lens of *Skinner* reveals that Congress has so significantly encouraged private cable operators to ban indecent programming on access channels that their actions must be attributed to the government.

**1. Section 10 Was Intended to Ban Indecent Speech on Access Channels and Is Structured to Accomplish this End.**

As was the case in *Skinner*, Congress, in enacting Section 10, "made plain . . . its strong preference" for a particular end: to ban indecent programming on access channels. Contrary to the *in banc* court's suggestion that Congress only wanted to "give cable operators the prerogative not to carry indecent programming," App. 19a, Senator Helms, the bill's principal sponsor, stated its purposes quite plainly: to "put an end to the kind of

things going on" on access channels and to "forbid cable companies from inflicting their unsuspecting subscribers with sexually explicit programs." 138 Cong. Rec. S646, S652 (daily ed. Jan. 30, 1992); see also *supra* pp. 12-13.

Congress carefully structured Section 10's various provisions to compel censorship. For example, the structure of the two leased access provisions — subsections (a) and (b) — works to ensure that most cable operators will do exactly what Congress wanted and ban indecent leased access programming. The interaction of these two subsections "present cable operators with an 'either/or' command: accentuate the positive by banning indecent leased access programming under [Section] 10(a), or eliminate the negative by blocking it under [Section] 10(b)." App. 47a (Wald, J., dissenting). There is no middle ground; the cable operator must either ban or block indecent materials. When given the choice between either establishing a separate blocked channel (and thereby having one fewer channel for its own use) or simply keeping indecent programming off a channel the cable operator cannot use for its own programming anyway, most cable operators will inevitably choose to ban. Indeed, the private cable operators' general hostility toward access programming was one of the reasons leased access channels were created in the first place. S. Rep. No. 92, 102d Cong., 1st Sess. 31 (1991). This natural predilection is further strengthened by the fact that blocked channels are technically cumbersome and financially burdensome.<sup>19</sup>

Moreover, as part of the comprehensive scheme, the liability provision of Section 10(d) provides the cable operator with a powerful incentive to ban all "indecent" material on both public access and leased access channels. Simultaneous with its decision to entrust to cable operators the power to ban indecent programming on access channels, Congress also partially

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<sup>19</sup>As one cable operator stated it in the rulemaking below: "[P]lacing indecent programming on a special, scrambled leased access channel is not a realistic alternative . . . . Scrambling a normally unscrambled channel requires a significant amount of time and labor." J.A. 231.

revoked the immunity from liability that these operators had enjoyed under the 1984 Act with respect to access programming. Section 10(d) thus places the private cable operator in peril for third-party speech that wanders into the undefined gray area of expression that "involves obscene material." As this Court recognized in *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959), if a law makes a media owner liable for the speech of an unaffiliated person, and yet, in turn, allows the media owner to avoid liability by censoring that speech, "all remarks even[] faintly objectionable would be excluded out of an excess of caution." *Id.* at 530; see also *Smith v. California*, 361 U.S. 147, 152-54 (1959) (liability for third party's obscenity will restrict constitutionally protected speech). Like the media owner in *WDAY*, cable operators can either risk liability under Section 10(d) for anything that might be construed as "involv[ing] obscene material," or they can take the safe route and simply ban all materials that access programmers cannot affirmatively certify to be decent. Their likely choice is clear; with little to gain by transmitting such programming, and much to lose, cable operators have every incentive to ban.<sup>20</sup>

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<sup>20</sup>The cable operators' comments in the rulemaking below confirm this obvious conclusion. See, e.g., J.A. 222 ("practical result of Section 10 will be that cable systems will establish policies which ban all 'questionable' programming altogether, applying the policy broadly in order to avoid liability"). Moreover, the FCC in the orders under review expressly justifies the certification requirement as "reasonable since cable operators are no longer statutorily immune from liability for obscene materials carried on . . . access channels." First Order ¶ 50, App. 155a; see also Second Order ¶ 25, App. 192a ("[I]n view of the removal of cable operators' immunity for obscene programming on access channels, permitting a certification requirement is a reasonable approach for this agency to adopt."). This record evidence has been reiterated in the cable operators' separate lawsuit challenging the constitutionality of subsection (d), where, as recently as June of 1995, Time Warner flatly declared that subsection (d) will require cable operators to "refuse to carry speech that may in fact be constitutionally protected" — e.g., indecent cable speech. Reply Brief of Time Warner, Inc. at 44, *Time Warner v. FCC*, Nos. 93-5349 (and consolidated cases) (D.C. Cir., filed June 26, 1995). Indeed, in defending Section 10(d) before the district court in that case, the government expressly endorsed such broad censorship of indecent programming by suggesting that a cable operator may avoid

**2. *The Regulatory Scheme Removes All Legal Barriers that Would Prevent Cable Operators' Censorship of Indecent Speech.***

As was also the case in *Skinner*, through passage of Section 10, Congress "removed all legal barriers" to the prohibition of indecent programming on access channels. To this end, Congress (1) repealed — although only with respect to the type of speech Congress disfavored — the 1984 Act's ban on operator control of access channels; (2) preempted any contrary state laws; and (3) superseded any contrary provisions of local franchising agreements.<sup>21</sup> Thus, not only has Congress paved the way to censorship by providing cable operators with the "discretion" to ban only indecent programming, but the FCC has ensured that no local authority can infringe this new-found power by invoking local law or enforcing the provisions of a franchising agreement forbidding an operator from exercising editorial discretion over access programming.

**3. *The Government Plays A Role in Facilitating the Censorship of Indecent Speech.***

Finally, Section 10 and its implementing regulations, as did the drug-testing regulations at issue in *Skinner*, also reserve a "participat[ory]" role for the government. The government will play an active role in the Section 10 scheme by "resolv[ing] any conflicts between a [leased access] programmer and an operator on" what constitutes "indecent" material. App. 43a. Such determinations will likely serve as precedents when disputes arise with respect to public access programming as well. Thus,

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liability for the content of access programming by simply exercising its right, under Sections 10(a) and 10(c), to censor "any programming that it *reasonably believes* could *potentially* be considered obscene." United States' Opposition Memorandum in Support of Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment on Plaintiffs' Claims Other Than "Must Carry" at 21-22, *Time Warner v. FCC*, No. 92-2494 (and consolidated cases) (D.D.C., filed Feb. 22, 1993) (emphasis added).

<sup>21</sup>As we argue *supra* at pp. 24-27, under this Court's decision in *Hanson*, the preemptive effect of Section 10 and the implementing regulations is sufficient by itself to show state action.

not only has Congress provided the *definition* by which an operator measures indecency, but the FCC will resolve disputes *about* this definition. The government participates in the Section 10 scheme by serving as the final judge on what constitutes indecent cable programming.

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To recap: Congress sought to put an end to "indecent" programming on access channels by enabling cable operators to ban only indecent programming, while otherwise preserving the prohibition against censorship by cable operators. In the case of leased access, an operator must ban such programming, or must place it on a separate blocked channel. Further, in the case of both public and leased access, if the operator does not take steps to prevent the transmission of programming that "involves" obscene material — whatever that means — then that operator now faces, for the first time, criminal and civil liability. Finally, to clear away any legal or contractual impediments to the operators' ability to ban, the FCC has announced that any conflicting state law or local franchising contract is superseded and that it will adjudicate disputes about whether programming is indecent. To say that Section 10 significantly encourages the outright ban of all indecent programming is to state the obvious. This Court, on strikingly similar facts, said exactly that in *Skinner v. RLEA*, 489 U.S. 602 (1989).

**D. Section 10 Requires First Amendment Scrutiny Because It Imposes Content-Based Distinctions in a Public Forum.**

Section 10(c) is also subject to First Amendment scrutiny because it imposes content-based distinctions on the speech available in the public forum provided by a public access channel. Once the state has created a public forum, it "may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum,'" *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2517 (1995), and any "content-based prohibition [in the forum] must be narrowly drawn to effectuate a compelling state interest." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Because Section 10 limits the scope of constitutionally protected

speech entitled to carriage on this electronic public forum, it is subject to First Amendment review.

As a general matter, a public forum is created when the government "intentionally open[s] a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). A local government does exactly that by requiring as a condition of franchise approval that the cable operator set aside a public access channel for the free use of the general public on a first-come, first-served, nondiscriminatory basis.<sup>22</sup> In this manner, the local governmental authority promotes the compelling government interest of "assuring that the public has access to a multiplicity of information . . . from diverse and antagonistic sources." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994).

The FCC, the courts, and Congress have all recognized that public access is a public forum. In 1981, for example, the FCC expressly declared that an access channel "to which the programmer has a right of access by virtue of local, state or federal law" is "a channel set aside as a public forum."<sup>23</sup> A number of courts have observed that public access channels possess all the characteristics of a public forum for purposes of

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<sup>22</sup>Thus, a public access channel is, at the very least, a designated public forum. Given that public access dates from the origin of the cable medium itself, public access's longstanding tradition in many communities may have conferred upon it the status of a *traditional* public forum — a "place[] which 'by long tradition or by government fiat ha[s] been devoted to assembly and debate.'" *Id.* (citation omitted).

<sup>23</sup>Amendment of Part 76 of the Commission's Rules and Regulations Concerning the Cable Television Channel Capacity and Access Channel Requirements of Section 76.251, 87 F.C.C.2d 40, 42 (1981).

First Amendment analysis.<sup>24</sup> Similarly, Congress itself has recognized that access channels constitute a public forum.<sup>25</sup>

The status of a public access channel as a public forum is not altered by the fact that cable operators are generally privately-owned corporate entities. Public access channels themselves cannot be pigeon-holed as the cable operator's "private property," any more than the sidewalk and streets — quintessential traditional public fora — can be called the "private property" of the abutting landowner, notwithstanding that title to the sidewalk and streets often rests with that landowner.<sup>26</sup> To the extent that the cable operator may be considered to have property rights over the public access channel, those rights are conditioned by the franchise agreement, which grants the public the right to use, and prevents the cable operator from excluding the public from using, the public access channel. Cf. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (ability to exclude is a basic characteristic of private property); *Kaiser Aetna v. United States*, 444 U.S. 164,

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<sup>24</sup>See, e.g., *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1452 (D.C. Cir. 1985) ("access rules . . . serve countervailing First Amendment values by providing a forum for [the] public"); *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 600 (W.D. Pa. 1987) ("access requirements" are intended to make cable channels available to the public on a first-come, first-served nondiscriminatory basis"), modified on other grounds, 853 F.2d 1084 (3d Cir. 1988); *Berkshire Cablevision of R.I., Inc. v. Burke*, 571 F. Supp. 976, 987 (D.R.I. 1983) (access rules "mandate that all individuals be given the opportunity to appear on cable television on a nondiscriminatory first-come, first-served basis"), vacated as moot, 773 F.2d 382 (1st Cir. 1985).

<sup>25</sup>See H.R. Rep. No. 934, *supra*, at 30, reprinted in 1984 U.S.C.C.A.N. at 4667 ("[p]ublic access channels are often the video equivalent of the speaker's soap box"); S. Rep. No. 381, 101st Cong., 2d Sess. 46 (1990) (access channels constitute "a free market of ideas").

<sup>26</sup>See 10A Eugene McQuillin, *Law of Municipal Corporations* § 30.32, at 280-81 (1990) ("the abutting landowner . . . own[s] the fee in the public way in front of his or her property . . . subject to the public easement"); 1A Chester J. Antieau, *Municipal Corporation Law* § 9.02 (3d ed. 1986) ("the abutting owners are owners of the fee to the center of the street, with the local government having only an easement therein").

176 (1979) (same). As the quid pro quo for setting aside these channels for public use, the local governmental authority provides the cable operator with "use of public rights-of-way and easements." *Turner*, 114 S. Ct. at 2452. The cable system "depend[s] for its very existence" on these easements, for without them, it could not lay or string the cable throughout a community. *Id.* Thus, the entire cable system — including access channels — depends on the short-term disruption and long-term occupation of valuable public rights-of-way. To label public access channels as "private property" would ignore these fundamental facts regarding the nature of any cable system.<sup>27</sup>

In any event, even if public access channels could somehow be deemed the "private" property of cable operators, this Court has expressly stated that public forum analysis may be applied to "private property dedicated to public use." *Cornelius*, 473 U.S. at 801.<sup>28</sup> Public access channels are undeniably "dedicated to public use," and in fact local governments have dedicated them explicitly for the public's expressive activity. Thus, even a nominally privately-owned public access channel constitutes a public forum. And Congress's attempt to impose content-based changes on public fora created by local governments must be subject to scrutiny under the First Amendment.

## II.

### SECTION 10 VIOLATES THE FIRST AMENDMENT.

We showed in the previous section that Section 10 is subject to First Amendment scrutiny. As we now demonstrate, and as

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<sup>27</sup>Because a reasonable nexus exists between providing the cable operator with valuable rights of way to lay cable and requiring the cable operator to grant a right of access to the public — namely, that unless the cable operator is permitted to use public rights of way, there could be no access channels — local governmental authorities' requiring access channels as a condition of franchise approval does not entail a taking. See *Nollan*, 483 U.S. at 836-37.

<sup>28</sup>See Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. Rev. 1713, 1759 (1987) (concluding that this Court does not "view the technicalities of property ownership as determinative" of whether a public forum exists).

the government and the *in banc* court both essentially conceded as to Section 10's core elements, see App. 11a, 104a n.9, 110a n.15, 111a n.16, this censorship scheme cannot withstand such scrutiny, and must therefore be struck down.

**A. Section 10 Fails the Least Restrictive Means Test.**

***1. As a Content-Based Regulation of Speech, Section 10 Is Presumptively Unconstitutional.***

The constitutional inquiry in this case is governed by the basic principle that government decisions to single out and discriminate against a particular type of speech based solely on its content are presumptively unconstitutional. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); see *Turner Broadcasting Sys. Inc. v. FCC*, 114 S. Ct. 2445, 2458 (1994) ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.") (citations omitted). Any attempt to rebut that presumption is subject to the strictest constitutional scrutiny. *Turner*, 114 S. Ct. at 2459; *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229-31 (1987). Content-based laws that demand such strict scrutiny include those "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner*, 114 S. Ct. at 2459.

Section 10 is just such a content-based law in that it singles out and discriminates against "indecent" programming. Unlike obscenity, sexually explicit speech that is considered "indecent" is protected by the First Amendment. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The controversial nature of the speech does not diminish its protected status, for "the fact that protected speech may be offensive to some does not justify its suppression." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) (citation omitted). Accordingly, Section 10 is presumptively unconstitutional, and

any attempt to justify its content-based distinctions must undergo strict scrutiny.

Section 10 cannot survive such scrutiny. Section 10's ostensible purpose, "to limit the access of children to indecent programming," Section 10(b), App. 126a, does not lessen the presumption of unconstitutionality. Time and time again, this Court has held that the protection of children fails as an excuse for an outright ban on sexually explicit material, regardless of the medium involved. See, e.g., *Butler v. Michigan*, 352 U.S. 380 (1957) (books); *Sable*, 492 U.S. at 127-31 (telephone); *Bolger*, 463 U.S. at 64-68 (unsolicited mail). The First Amendment does not tolerate the government's use of child protection as an excuse "to reduce the adult population to . . . [viewing] only what is fit for children." *Butler*, 352 U.S. at 383.<sup>29</sup>

2. *Congress and the FCC Have Failed to Consider Less Restrictive Means Available to Advance Their Goal.*

To overcome the presumption of unconstitutionality that attaches to content-based regulations on speech such as Section 10, the regulation must use "the least restrictive means" "to promote a compelling [governmental] interest." *Sable*, 492 U.S. at 126. The critical question here is thus whether the methods used to single out and disadvantage disfavored speech constitute the least restrictive means for effectively furthering the government's asserted interest in the protection of children.

Section 10's regulatory scheme fails this test. With respect to Sections 10(a) and 10(c), which result in a right of carriage on access channels for non-indecent speech, without such a right for indecent speech, there are a number of less restrictive alternatives that either do not require content-based distinctions

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<sup>29</sup>Nothing about the cable medium alters in the least this presumption of unconstitutionality. "Cable programmers . . . engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment." *Turner*, 114 S. Ct. at 2456. Most importantly, "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation" — namely, "the unique physical limitations of the broadcast medium" — "does not apply in the context of cable regulation." *Id.*

or else do not threaten the outright suppression of the controversial speech. Similarly, for Section 10(b), which requires the blocking of indecent leased access programming if the cable operator has not already banned it outright pursuant to Section 10(a), less restrictive means are also available.

We consider below several available alternative means, each of which is less restrictive than Section 10's censorship scheme. Petitioners do not endorse any particular method as the least restrictive. Rather, we note the existence of these less restrictive means to demonstrate the constitutional infirmity of Section 10's more restrictive scheme.

"Safe harbors," which are used in the broadcast medium, provide one such less restrictive alternative. Under a regulatory scheme based upon safe harbors, disfavored programming is "channeled" to certain hours when unsupervised children are less likely to be in the viewing audience. See, e.g., *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), cert. petition filed, 64 U.S.L.W. 3271 (Sept. 28, 1995). Although content-based, and although serious questions have been raised about the circumstances under which partial "safe harbor" bans are valid, a safe harbor scheme does not result in disfavored programming being banned or blocked altogether, and therefore makes it more readily available to adult viewers.

Lockboxes — which Congress has required cable operators to make available to subscribers since 1984 — provide another less restrictive alternative. A lockbox does not permit the government to favor or disfavor any type of speech and thus is entirely content-neutral. Instead, a lockbox enables parents on their own — rather than the government or its delegate — to determine what programming shall be received and what programming shall be blocked, be it indecency, violence, or anything else. Thus, unlike Section 10, the lockbox does not burden the "crucial" right of adult cable viewers "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); see also *Turner*, 114 S. Ct. at 2458 ("At the heart of the First Amendment lies the principle that each

person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence."').<sup>30</sup>

In fact, under this Court's decision in *Sable*, Congress's failure to consider the effectiveness of the existing lockbox requirement before enacting Section 10 forecloses any argument that Section 10 provides the least restrictive means of protecting children. In *Sable*, this Court struck down a content-based statute banning indecent commercial telephone messages because Congress had failed to consider whether existing, less restrictive FCC regulations addressing the same matter already protected children effectively. Thus, "the congressional record presented . . . no evidence" that the existing regulations were ineffective. 492 U.S. at 130. "No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent" the existing regulations. *Id.* Indeed, the Court found that for all that appeared in the record, "only a few of the most enterprising and disobedient young people would manage to secure access to such [indecent] messages." *Id.* Under those circumstances, this Court held, the more restrictive statute at issue was "not a narrowly tailored effort" to serve the state's interest in preventing minors from being exposed to indecent speech. *Id.* at 131.

Here, as in *Sable*, Congress created an entirely new content-based scheme for regulating indecency without considering whether the existing statutory mechanism was effective. In the 1984 Act, Congress specified that "lockboxes" must be made available to subscribers "to restrict the viewing of programming which is obscene or indecent." 47 U.S.C. § 544(d)(2), Stat. App. 5a; see *supra* pp. 9-10. Congress praised the lockbox as "one means to effectively restrict the availability of such programming, particularly with respect to child viewers, without infringing the First Amendment rights of the cable operator, the cable programmer, or other cable viewers." H.R. Rep. No. 934,

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<sup>30</sup>Even Section 10(b)'s blocking requirement, though it would not be the least restrictive means, is clearly less restrictive than the outright ban authorized by Sections 10(a) and 10(c).

*supra*, at 70, reprinted in 1984 U.S.C.C.A.N. at 4707. Further, the FCC, cable operators, and indeed the *in banc* court below all have similarly acknowledged the effectiveness of lockboxes. See *supra* pp. 10-11. Despite this unanimous recognition of the utility of lockboxes, Congress enacted Section 10 without even mentioning the subject, let alone articulating any basis to conclude that lockboxes are not effective.

In implementing Section 10, the FCC too failed to adduce any evidence that lockboxes somehow had become ineffective means for the protection of children. Faced with this lack of record evidence, the FCC summarily relied on findings about telephone blocking mechanisms. See First Order ¶¶ 13-14, App. 134a-136a. As this Court's precedents teach us, however, the FCC's conclusions about the effectiveness of telephone blocking mechanisms cannot be used to prop up the constitutionality of a statute involving an entirely different medium of communication. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) ("Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method.") (citation omitted); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."). In fact, the telephone analogue to the cable lockbox suffers from a number of problems that have no application to the cable lockbox because of the different technologies involved, making conclusions about telephone blocking mechanisms irrelevant to any analysis of the effectiveness of cable lockboxes.<sup>31</sup>

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<sup>31</sup>To take the most obvious example, the FCC found telephone blocking devices ineffective against telephone indecency because parents could not program such devices to block each telephone number of every indecent telephone service in the United States and overseas. Not only did no list exist of the approximately 100 such services nationally, but their telephone numbers changed constantly, making any such list quickly obsolete. See, e.g., *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, GEN Dkt. No. 83-989, 2 FCC Red 2714, ¶¶ 34-36 (1987); see also *Enforcement of Prohibitions Against the Use of*

Courts have the "obligation to exercise independent judgment when First Amendment rights are implicated" in order to "assure that, in formulating its judgments, Congress has drawn *reasonable inferences based on substantial evidence*." *Turner*, 114 S. Ct. at 2471 (plurality opinion) (emphasis added). Here, Congress and the FCC have articulated no reason and pointed to no evidence that warrants supplementing the content-neutral lockbox requirement with Section 10's content-based scheme. Absent such evidence, the possibility that lockboxes will not provide a perfect mechanism for shielding young people from indecent programs — *i.e.*, that "a few of the most enterprising and disobedient young people" will circumvent the system, *Sable*, 492 U.S. at 130 — does not save Section 10. Because the statute is not narrowly tailored to achieve the government's stated objective, it must be struck down.

**B. Congress Has Singled Out Those Who Speak Via Access Channels for Content-Based Regulation.**

Section 10 constructs an impermissible system of discrimination by imposing a number of content-based regulations on those who speak via access channels but not on those who speak on other cable channels. In this fashion, it runs afoul of this Court's admonition that "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978); see *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2516 (1995); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r*, 460 U.S. 575, 592 (1983).

Those who speak via access channels suffer a number of discriminatory burdens and impairments under Section 10.

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Common Carriers for the Transmission of Obscene Materials, GEN Dkt. No. 83-989, FCC 86-322, 1986 FCC Lexis 3012, ¶ 17 (July 18, 1986). In contrast, a cable system offers only a handful of access channels, the locations of which change infrequently and only after notice to subscribers. A lockbox can easily be programmed to block receipt of these channels, either constantly or during specified times. See J.A. 79-154 (instructions for various lockboxes).

Most prominently, Section 10 discriminates against these speakers by requiring them, in order to ensure their right to carriage on an access channel, to certify that their speech does not fall within the congressionally disfavored categories. If they cannot so certify, they face censorship of their speech. Section 10(b); 47 C.F.R. §§ 76.701(d)-(f), 76.702, App. 171a-172a, 197a-198a. Programmers of other cable channels need make no such certification to avoid censorship.

This discriminatory scheme favors broadcasters, for example, over those who speak via access channels. Even though broadcasters are entitled to uncensored carriage on cable via the "must-carry" provisions reviewed by this Court in *Turner*, see Sections 4 & 5 of the 1992 Act, 47 U.S.C. §§ 534 & 535, they are entirely free to air indecent programming between the hours of 10:00 p.m. and 6:00 a.m. See *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), *cert. petition filed*, 64 U.S.L.W. 3271 (Sept. 28, 1995). Moreover, broadcasters are subject to no requirement that they "certify" the purity of their programs. In contrast, an access programmer desiring to show the exact same programming — and who has no other method of communicating via the cable medium — has no similar right of carriage.

Section 10 thus distinguishes among speakers for content-based regulation based upon a criterion — whether the programmer uses access channels rather than another cable channel — that "bears no relationship whatsoever to the particular interests . . . asserted." *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1514 (1993) (emphasis omitted). This discrimination among speakers is not related to the underlying constitutional purpose, for there is undisputed record evidence that other channels contain, for example, a plethora of sexually explicit programming.<sup>32</sup> Moreover, cable

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<sup>32</sup>For example, HBO's top-rated documentary series, "Real Sex" has highlighted segments such as a home striptease class and a studio that makes pornographic films for women. J.A. 309-10. HBO is owned by Time Warner Entertainment, the parent of Time Warner Cable. Similarly, the Playboy channel has been shown on both leased and operator-programmed channels.

operators' demonstrated hostility toward access, see *supra* p. 7, and their "financial incentive to favor their affiliated programmers," *Turner*, 114 S. Ct. at 2454; see 1992 Act § 2(a)(5), indicates that cable operators will prohibit indecent programming on access while retaining this profitable income source on their own channels.<sup>33</sup>

Section 10's discrimination against those who speak via access channels therefore constitutes "an impermissible means of responding to the [government's] legitimate interests." *City of Cincinnati*, 113 S. Ct. at 1514. This discrimination is particularly problematic given that access channels were intended to provide a forum for members of the public and other entities "who generally have not had access to the electronic media." H.R. Rep. No. 934, *supra*, at 30, 1984 U.S.C.C.A.N. at 4667.

### C. Section 10 Is Unconstitutionally Vague.

Vague laws threaten constitutional liberties by creating the potential for arbitrary and discriminatory enforcement and by inhibiting lawful conduct on the part of citizens uncertain about what they must do to comply. *E.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). These threats are particularly acute, and constitutional scrutiny is accordingly more exacting, where "[t]he threat of sanctions may deter [the] exercise [of] . . . First Amendment freedoms." *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); see also *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.").

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see 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms), but its content is regulated only on leased access. Moreover, MTV abounds with sexually suggestive programming and music lyrics that could be interpreted as promoting lawlessness under the broad standard enacted by Congress.

<sup>33</sup>For example, as of June 1992, the Playboy Channel had generated over \$50 million for cable operators. J.A. 365.

Section 10's most basic vagueness defect lies in its definition of "indecent" itself.<sup>34</sup> Congress and the FCC have defined "indecent programming" as programming that "describes or depicts sexual or excretory activities or organs in a *patently offensive* manner as measured by *contemporary community standards*." 47 C.F.R. § 76.701(a), App. 171a (emphasis added); see Section 10(a), App. 126a. This definition lacks any discernible scope or limit. First, given the subject matter, virtually any "depiction" could be found "patently offensive" by some. Although this Court has included the phrase "patently offensive" in its definition of obscenity, *Miller v. California*, 413 U.S. 15, 24 (1973), it has limited the risk of arbitrary enforcement and self-censorship by adding other safeguards — such as requiring that states "specifically define[]" the covered sexual conduct and that the work "taken as a whole, appeal to the prurient interest in sex" and lack "serious literary, artistic, political, or scientific value" — which limit the obscenity category to "hard core" material. *Id.* at 24, 27. "Indecent material," in contrast, is defined by "offensiveness" alone.

Second, the phrase "contemporary community standards" is utterly without content or precision. According to the FCC, this standard is "based on the 'average cable subscriber' . . . not confined to a specific geographical area or specific cable system." First Report, App. 148a-49a. By pretending that there is a single "average viewer" for the whole nation, this explanation makes matters worse, not better. Indeed, this Court has

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<sup>34</sup>The government's definition of "indecent" would require vagueness analysis even if Sections 10(a) and 10(c) were somehow deemed otherwise not subject to First Amendment scrutiny. First, Section 10(b) *mandates* the blocking of "indecent programming," which all parties agree renders that subsection subject to constitutional scrutiny. *E.g.*, App. 12a ("[i]f the government . . . command[s] a particular result, . . . [s]tate action . . . exist[s]"). Second, Section 10(a) provides the definition of "indecent," and the FCC uses that same definition in its regulations promulgated pursuant to Section 10(c). Whether an access programmer's speech may be suppressed depends upon whether that speech falls within the category of speech defined by Congress and the FCC, and so that definition is subject to a vagueness analysis. See *supra* pp. 20-22.

held that "structur[ing] a *national* 'community standard' [for offensiveness] would be an exercise in futility." *Miller*, 413 U.S. at 30.

In essence, the government's definition of "indecent" empowers censors to ban constitutionally-protected speech based on nothing more than their subjective judgment as to what constitutes good taste. Such subjective provisions cannot form the basis for a valid regulation. In similar situations, this Court has not hesitated to strike down statutes based on similarly subjective definitions. *E.g.*, *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (ordinance punishing assembly of three or more persons who "conduct themselves in a manner annoying to persons passing by" held unconstitutional because of subjective nature of "annoyance"); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 688 (1968) (invalidating ordinance where "[t]he only limits on the censor's discretion [was] his understanding of what is included within the term 'desirable, acceptable or proper,' amounting to 'nothing less than a roving commission'" (citation omitted); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric."); see also *Pope v. Illinois*, 481 U.S. 497, 505 (1987) (Scalia, J., concurring) ("Just as there is no use arguing about taste, there is no use litigating about it.").

The enforcement scheme for censorship under Section 10 exacerbates the potential for arbitrary and discriminatory application. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), this Court invalidated a state disciplinary rule on vagueness grounds upon finding that the rule was "so imprecise that discriminatory enforcement [was] a real possibility." *Id.* at 1051; see *id.* at 1082 (O'Connor, J., concurring). Here, the statute delegates censorship functions to cable operators, whose economic interests are hostile to access programmers. And Section 10(a) vests cable operators with an *additional* layer of subjective discretion by allowing them to censor access programming that they "reasonably believe[]" to be indecent. App. 126a; see *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991) (invalidating rule delegating obscenity determination to National Endowment for the Arts

(NEA) and requiring grant recipients to certify that funds would not be used "to promote, disseminate, or produce materials which *in the judgment of the NEA . . .* may be considered obscene.") (emphasis added). In these circumstances, there is more than a "real possibility" that cable operators will enforce the statute in a discriminatory and arbitrary way, *Gentile*, 501 U.S. at 1051 — that result is virtually certain.

Not only will the Section 10 scheme result in arbitrary and discriminatory application by cable operators, but it will also tend to cause programmers to self-censor programming that is not in fact indecent. The FCC's rules force programmers to self-identify "any programming that is indecent," 47 C.F.R. § 76.701(d), App. 171a; see 47 C.F.R. § 76.702, App. 197a-98a, so that an operator may ban it, and provide for a wide array of sanctions — including a possible ban on all future programming — in the event that a programmer mistakenly fails to identify programming as indecent. See First Order ¶¶ 43, 75, App. 151a-52a, 167a-68a. Thus, in order to be sure that their programs do not meet a cable operator's subjective definition of what is "patently offensive," programmers concerned about these possible sanctions will "steer far wider of the unlawful zone" by "restricting their [programming] to that which is unquestionably safe." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).<sup>35</sup>

That valuable, non-indecent access programming will be suppressed, either through cable operators' arbitrary or discriminatory enforcement or by programmers' excessive caution, is not mere speculation. Cable operators' comments already reveal that they intend to exercise their censorship powers broadly. *E.g.*, J.A. 1-2, 175-76. At least some cable operators may reasonably be expected to behave in a manner similar to the recently reported actions of an on-line service provider which, in an attempt to ban offensive words from the

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<sup>35</sup>Under the FCC's rule, what programmers do not themselves hold back just to be safe, cable operators will still have the opportunity to suppress. See First Order ¶ 43 n.39, App. 151a-152a.

system, deleted the word "breast" — and with it, the personal profiles of breast cancer survivors and other information of vital importance to potential breast cancer victims. See Amy Harmon, *On-Line Service Draws Protest in Censor Flap*, L.A. Times, Dec. 2, 1995, at D1.

This Court's decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), does not justify the vague standards presented here. In what this Court has stressed was "an emphatically narrow holding," *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 127 (1989), the Court in *Pacifica*, while upholding an FCC determination that a broadcast entitled "Filthy Words" was indecent, stated that its scrutiny would be limited to the particular circumstances of that broadcast. 438 U.S. at 734-35; see *id.* at 742 (opinion of Stevens, J.). Because the specific broadcast at issue concededly fit within the FCC's definition of indecent speech, the Court did not reach the issue of whether that definition would inhibit the expression of *non-indecent* speech by others, as it surely will. In any event, the Court in *Pacifica* was not confronted by a regulation which gave economic adversaries the power to censor expression based on what they "reasonably believe[]" to be indecent, as is the case here.

**D. Section 10's Censorship Scheme Inflicts Unconstitutional Prior Restraints Upon Protected Expression.**

A content-based censorship scheme that constitutes a prior restraint on protected expression is presumptively invalid. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). Section 10 and its implementing regulations impose just such a system of content-based prior restraints on protected expression over access channels, for they deny members of the public and others who speak via access channels the power to use access channels "in advance of actual expression" and based upon the nature of their message. *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) (quoting *Southeastern Promotions*, 420 U.S. at 553).

This denial occurs in two separate ways. First, by delegating a broad censorship power to those with the economic incentives to use it, and adding the coercion of Section 10(d), Congress has created a corps of involuntary government surrogates who are pressured to censor certain presumptively-protected expression; has defined (vaguely) the content of what speech may be censored; and has embroiled the FCC in regulating the censorship system. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68-70 (1963) (finding system of informal censorship by persuasion and intimidation constituted prior restraint). Second, subsection (b) requires all indecent programming on leased access channels to be blocked, thus preventing its receipt by cable viewers. While the customer may request in writing that the block be lifted, the operator may take up to an entire month to comply with this request. 47 C.F.R. § 76.701(c), App. 171a. Such delay — which in many cases will result in the effective suppression (and not merely delay) of speech the viewer seeks and will be imposed without prompt judicial review — constitutes "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).<sup>36</sup>

Try as it might, the government cannot rebut this presumption of unconstitutionality. To be constitutional, bans on protected speech must "take[] place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). At a bare minimum, these safeguards must provide for prompt judicial review initiated by the censor, with the burden of proof on the censor. *Southeastern Promotions*, 420 U.S. at 560. But the banning of protected speech under Section 10 occurs without

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<sup>36</sup>Moreover, the very requirement that cable customers submit a written request may in itself chill dissemination of speech. As this Court recognized in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), members of the public are "likely to feel some inhibition in sending for literature which federal officials have condemned." *Id.* at 307; see also *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 767 (1986) (state may not "chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities").

any judicial intervention. For that reason alone, Section 10 violates the First Amendment.

### CONCLUSION

The judgment of the Court of Appeals should be reversed, and Section 10 and the regulations promulgated thereunder should be struck down as violative of the First Amendment.

Respectfully submitted,

JAMES N. HORWOOD  
SPIEGEL & MCDIARMID  
1350 New York Ave., N.W.  
Washington, D.C. 20005  
(202) 879-4002

*Counsel for Petitioners Alliance  
for Community Media and  
Alliance for Communications  
Democracy*

ANDREW JAY SCHWARTZMAN  
GIGI SOHN  
MEDIA ACCESS PROJECT  
2000 M Street, N.W.  
Washington, D.C. 20036  
(202) 232-4300

ELLIOT MINCBERG  
LAWRENCE OTTINGER  
PEOPLE FOR THE AMERICAN  
WAY  
2000 M Street, N.W.  
Washington, D.C. 20036  
(202) 467-4999

*Counsel for Petitioner People For  
the American Way*

I. MICHAEL GREENBERGER  
*Counsel of Record*  
THOMAS J. MIKULA  
MARK S. RAFFMAN  
MICHAEL K. ISENMAN  
DAVID B. GOODHAND  
SHEA & GARDNER  
1800 Massachusetts Ave., N.W.  
Washington, D.C. 20036  
(202) 828-2000

*Counsel for Petitioners  
Alliance for Community Media,  
Alliance for Communications  
Democracy, and People For  
the American Way*

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## **STATUTORY APPENDIX**



The following are relevant statutory provisions relating to PEG or public access cable channels from the Cable Communications Policy Act of 1984 ("the 1984 Act"), and Section 10(c) of the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act"), as they appear in the U.S. Code:

**47 U.S.C. § 531 (1988).**

**Cable channels for public, educational, or governmental use**

**(a) Authority to establish requirements with respect to designation or use of channel capacity**

A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

**(b) Authority to require designation for public, educational, or governmental use**

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

....

**(e) Editorial control by cable operator**

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section.

....

[§ 611 of the Communications Act of 1934, as added by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2782.]

[Note to 47 U.S.C. § 531 (Supp. V 1993)]

## REGULATIONS

Pub. L. 102-385, § 10(c), Oct. 5, 1992, 106 Stat. 1486, 1503, provided that: "Within 180 days following the date of the enactment of this Act [Oct. 5, 1992], the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

\* \* \* \*

The following are relevant statutory provisions relating to leased access cable channels from the 1984 Act and Sections 10(a) and 10(b) of the 1992 Act, as they appear in the U.S. Code:

**47 U.S.C. § 532 (1988 & Supp. V 1993).**

### **Cable channels for commercial use**

#### **(a) Purpose**

The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.

#### **(b) Designation of channel capacity for commercial use**

(1) A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements:

(A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.

(D) An operator of any cable system with fewer than 36 activated channels shall not be required to designate channel capacity for commercial use by persons unaffiliated with the operator, unless the cable system is required to provide such channel capacity under the terms of a franchise in effect on October 30, 1984.

(E) An operator of any cable system in operation on October 30, 1984, shall not be required to remove any service actually being provided on July 1, 1984, in order to comply with this section, but shall make channel capacity available for commercial use as such capacity becomes available until such time as the cable operator is in full compliance with this section.

....

(5) For the purposes of this section, the term "commercial use" means the provision of video programming, whether or not for profit.

....

**(c) Use of channel capacity by unaffiliated persons; editorial control; restriction on service; rules on rates, terms, and conditions**

(1) If a person unaffiliated with the cable operator seeks to use channel capacity designated pursuant to subsection (b) of this section for commercial use, the cable operator shall establish, consistent with the purpose of this section and with rules prescribed by the Commission under paragraph (4), the price, terms, and conditions of such use which are at least

sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.

(2) A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

....

**(h) Cable service unprotected by Constitution**

Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority or the cable operator is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States. This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

....

**(j) Single channel access to indecent programming**

(1) Within 120 days following October 5, 1992, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) of this section by —

(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).

[§ 612 of the Communications Act of 1934, as added by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2782, and as amended by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §§ 9, 10(a), (b), 106 Stat. 1484, 1486.]

\* \* \* \*

The following are other relevant provisions from the 1984 Act and Section 10(d) of the 1992 Act as they appear in the U.S. Code:

47 U.S.C. § 544 (1988 & Supp. V 1993), as amended, 47 U.S.C.A. § 544(d)(2) (West Supp. 1995).

**Regulation of services, facilities, and equipment**

....

**(d) Cable service unprotected by Constitution; blockage of premium channel upon request**

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

(2) In order to restrict the viewing of of [sic] programming which is obscene or indecent upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

....

[§ 624(d) of the Communications Act, Cable Communications Policy Act of 1984, § 2, 98 Stat. 2789-90, and the Consumer Protection and Fair Credit Reporting Act, 15 U.S.C. §§ 1602-385, § 15, 106 Stat. 1073, subsection (3), not quoted in the Assistance of Law Enforcement Act, 18 U.S.C. §§ 303(a)(23), 304(a)(12),

47 U.S.C. § 558 (Supp. V 1988)]

### **Criminal and civil liability**

Nothing in this subchapter shall impose criminal or civil liability on any operator pursuant to the provisions of this title for slander, obscenity, incitement to violence, misleading advertising, or any other offense if the operator shall not incur any liability for material carried on any channel of communication for governmental use or on any channel of communication under section 532 of this title or for any program if the program involves obscenity.

[§ 638 of the Communications Act, Cable Communications Policy Act of 1984, § 2, 98 Stat. 2801, and as amended by the Consumer Protection and Fair Credit Reporting Act, 15 U.S.C. §§ 1602-385, § 10(d), 106 Stat. 1073, subsection (3), not quoted in the Assistance of Law Enforcement Act, 18 U.S.C. §§ 303(a)(23), 304(a)(12),

Communications Act of 1934, as added by the  
 Cable Television Policy Act of 1984, Pub. L. No. 98-549,  
 as amended by the Cable Television  
 Competition Act of 1992, Pub. L. No.  
 102-550 (changing caption and adding  
 here), and by the Communications  
 Decency Act, Pub. L. No. 103-414,  
 108 Stat. 4295, 4297 (Oct. 25, 1994).]

ty

shall be deemed to affect the  
 of cable programmers or cable  
 Federal, State, or local law of libel,  
 ent, invasions of privacy, false or  
 other similar laws, except that cable  
 any such liability for any program  
 designated for public, educational,  
 any other channel obtained under  
 under similar arrangements unless  
 the material.

Communications Act of 1934, as added by the  
 Cable Television Policy Act of 1984, Pub. L. No. 98-549,  
 as amended by the Cable Television  
 Competition Act of 1992, Pub. L. No.  
 102-550 (inserting "unless the program  
 at the end of the section).]